SUPREME COURT, U.S.
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In The

Supreme Court of the United States

JOHN DAVIS,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES H. LESAR
1003 K Street, N.W.
Suite 640
Washington, D.C. 20001
(301) 657-4298

Attorney for Petitioner John Davis

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the holding in *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Resources*, 534 U.S. 598 (2001) that the term "prevailing party" requires a judicially sanctioned change in the relationship of the parties in order to be eligible for an award of attorney's fees and costs in two civil rights statutes extend to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), which provides that a plaintiff who "substantially prevails" is eligible for fees?

2. If *Buckhannon* does apply to Freedom of Information Act cases, did the United States Court of Appeals for the District of Columbia apply it incorrectly to this case, in which petitioner, after four appellate remands and 18 years of litigation, has received 158 of the 163 audiotapes he filed suit to obtain?

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PETITION FOR A WRIT OF CERTIORARI

John Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals [App. 1-25] is reported at 460 F.3d 92 (D.C. Cir. 2006). The District Court's order denying the application for an award of attorney's fees [App. 26-27], is unreported.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 22, 2006. The Petition for Rehearing and Suggestion of Rehearing En Banc was denied on November 13, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent part of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), provides as follows:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

STATEMENT

A. Administrative Proceedings

Petitioner John Davis ("Davis") is an author who filed this Freedom of Information Act lawsuit to get copies of audio surveillance tapes for his biography of Carlos Marcello ("Marcello"), the New Orleans crime boss, entitled *Mafia Kingfish: Carlos Marcello and the Assassination of John F. Kennedy* (McGraw-Hill, 1989). Marcello was investigated for possible complicity in the assassination of President John F. Kennedy by the House Select Committee on Assassinations.

Seeking information for his forthcoming book, on October 28, 1986, Davis submitted a Freedom of Information Act ("FOIA") request to the New Orleans office of the Federal Bureau of Investigation ("FBI") for copies of tape recordings introduced into evidence at Marcello's BRILAB trial. ("BRILAB" was the acronym for the FBI's undercover investigation of Marcello's labor racketeering activities which resulted in his conviction. Subsequently, his conviction was overturned.) The FOIA unit of the Justice Department's Office of Law Enforcement Operations ("OLEO") informed Davis, after a "partial search" had been conducted, that "in view of the nature of the records sought . . . a further search would . . . be pointless. Either we would not locate the records, or we would locate some or all of them and withhold them" pursuant to 5 U.S.C. § 552(b)(3). March 12, 1987 letter from L. Jeffrey Ross to James H. Lesar. [R. 27, Amended Complaint, Exh. 10]

Davis appealed. The Office of Information and Privacy ("OIP") remanded the request to the Justice Department's Criminal Division "for further processing in order to determine whether any materials which were introduced

at trial (and which may therefore be released to your client) can be located." June 30, 1987 letter from Richard L. Huff to James H. Lesar. [R. 27, Amended Complaint, Exh. 17]

It was clear from OIP Co-Director Huff's letter that OPI had imposed on the Criminal Division the obligation to locate the tapes and determine which ones had been introduced in evidence at Marcello's trial. However, substantial time passed without any indication of progress on this front. Nor did the Government ever advise Davis that if he filed suit it would contend that he had the burden of producing evidence as to which tapes had been introduced in evidence. Consequently, after six months with no word on the status of the tapes, it was clear that Davis could only obtain prompt access to them if he filed suit. This ineluctable conclusion caused him to file suit. At no time prior to the filing of the suit was Davis advised that in court the Government would take the position that he had the burden of showing what tapes had been introduced at Marcello's trial.

B. Initial Proceedings in District Court

After more than six months had passed without the release of any of the tapes, Davis filed suit on January 20, 1988. After suit was filed, the FBI claimed for the first time that, after making extensive efforts to do so, it was unable to determine which of 163 located tapes had been introduced in evidence at the BRILAB trial, and that therefore it had to withhold all of the tapes. The FBI filed a lengthy declaration which asserted that Special Agent Warren Jung, Principal Legal Adviser, New Orleans Field Office, assisted by the Marcello trial judge's law clerk, had

searched through several boxes of materials at the courthouse, and was "unable to locate any records or exhibit list which would indicate the tapes or portions of tapes actually played during the trial."

On cross-motions for summary judgment, the District Court ruled that the FBI had the burden of showing that the tapes were exempt from disclosure. It stated that material "unconditionally revealed in open court 'enter[s] the public domain for all time beyond recall,' and therefore cannot be withheld under the FOIA exemptions[.]" Since it was conceded that some tapes had been played at trial, and the FBI could not, after "what appears to have been a diligent inquiry," show which tapes or portions had not been disclosed, the Court ruled that FBI had failed to meet its burden under the FOIA. May 3, 1991 Memorandum Opinion at 3. [R. 83] Thus, all 163 tapes were presumed to have been admitted in evidence and must therefore be released. *Id.*

C. *Davis I* Appeal and Remand

The FBI appealed. The Court of Appeals reversed, holding that "a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Davis v. U.S. Dept. of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) ("*Davis I*") "To show – as it conceded he had – that *some* of the tapes were played. . . ." *Id.*, at 1280 (emphasis in original).

On remand, the District Court ordered Davis to show cause why the case should not be dismissed. Davis responded by producing official records of the Marcello trial, including the docket entries and portions of the trial

transcript showing tapes that had been introduced. These materials came from the same boxes allegedly examined by FBI Special Agent Warren Jung in his unsuccessful search for records indicating what had been introduced at trial.

As a result of this showing, the FBI conceded that 158 of the 163 tapes had to be released. To withhold the five other tapes – Nos. 2, 3, 6, 31, and 151 – the FBI asserted Exemption 7(C). In addition, it said it was unable to locate Tape No. 127. Thus, it actually released 157 of the 163 tapes initially identified.

The District Court upheld the Exemption 7(C) claim for the five still-withheld tapes. October 16, 1997 Memorandum and Order, at 12-14. [R. 146] In addition, it sustained the adequacy of the FBI's search for Tape No. 127 and for the transcripts of the tapes. *Id.*, at 8, 10-11.

D. *Davis II* Appeal and Remand

Davis appealed. In *Davis II*, the D.C. Circuit granted in part the FBI's motion for summary affirmance, upholding the adequacy of its search for missing tape No. 127 and for the transcripts of the tapes. *Davis v. Dep't of Justice*, 1998 WL 54522 (D.C. Cir. July 31, 1998). But the Court again remanded the case to District Court, this time "to determine whether any of the five tapes withheld in their entirety. . . . contain material that can be segregated and disclosed without unwarrantably impinging upon anyone's privacy." *Id.* (citation omitted)

On remand, the FBI reviewed the five tapes for segregability. It found that tape No. 151 could be released in full because the main speaker on the tape, Vincent

Marinello, was deceased, while the other four tapes remained entirely withholdable. The District Court affirmed the FBI's position that there was no segregable material on these tapes. Memorandum and Order, September 15, 2000. [R. 207]

E. *Davis III* Appeal and Remand

Davis appealed again to the Court of Appeals. In *Davis III*, the D.C. Circuit remanded the case to District Court, this time for it to consider the adequacy of the FBI's "efforts to ascertain whether putative beneficiaries of Exemption 7(C) are alive or dead" in light of its recent ruling in *Schrecker v. U.S. Dep't of Justice*, 254 F.3d 162 (D.C. Cir. 2001) ("*Schrecker I*"). *Davis v. Dept. of Justice*, 2001 WL 148882 (D.C. Cir. Oct. 17, 2001) ("*Davis III*").

On remand, the FBI moved for summary judgment and sought to demonstrate its compliance with the D.C. Circuit's remand order. Davis cross-moved and sought discovery and a *Vaughn v. Rosen* index. By order dated July 23, 2002, the District Court ordered the FBI to contact each speaker on the four tapes that remained withheld and advise them of Davis' FOIA request and that the tapes they appeared on would be released unless they objected in writing within thirty days to such release. The Court denied Davis' motion for summary judgment "to the extent inconsistent with the relief otherwise ordered," and it also denied Davis' request for discovery and a *Vaughn v. Rosen* index. Finally, he further denied a motion for attorney's fees Davis had previously made, citing this Court's decision in *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Resources*, 534 U.S. 598 (2001) ("*Buckhannon*").

The FBI moved for reconsideration. Two years later the Court issued an order amending its July 23, 2002 order. It relieved the FBI "from undertaking the additional tasks mandated" in that order, and it dismissed the case with prejudice. [App. 26-27]

F. Davis IV Appeal

Davis appealed for a third time. The Court of Appeals reversed the District Court's grant of summary judgment and directed that on remand "the FBI evaluate alternative methods for determining whether the speakers on the requested audiotapes are dead, and that thereafter the district court determine whether the FBI's chosen course is reasonable." *Davis v. Dept. of Justice*, 460 F.3d 92 (D.C. Cir. 2006).

The Court of Appeals upheld the District Court's denial of attorney's fees. It reaffirmed its holding in *Oil, Chemical & Atomic Workers International Union AFL-CIO v. Department of Energy*, 288 F.3d 452, 454-457 (D.C. Cir. 2002) ("*OCAW*"), which extended this Court's decision in *Buckhannon* to FOIA cases. In *Buckhannon*, this Court construed the attorney's fees provisions not of the FOIA, but of two other statutes that permitted courts to award fees to "a prevailing party." *Buckhannon* rejected the plaintiffs' contention, which it characterized as the "catalyst theory," that "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 601. Instead, this Court ruled that for a litigant to be a prevailing party, there must have been a "judicially sanctioned change in the relationship of the parties." *Id.* at 605. This Court further held

that "[E]nforceable judgments on the merits and court-order consent decrees" create such a change.

In *OCAW*, the D.C. Circuit held that although the "substantially prevailed" language in the FOIA attorney's fees provision differs from the "prevailir ; party" term used in the two statutes at issue in *Buckhannon*, the FOIA language was the "functional equivalent of the 'prevailing party'" phrase used in the FOIA provision. *Id.* at 455-56. Consequently, in order for plaintiffs in FOIA actions to become eligible for an award of fees, "they must have been awarded some relief by [a] court, either in a judgment on the merits or in a court-ordered consent decree." *Id.* at 456-57.

Although it conceded that Davis had obtained nearly all of the relief he went to court to secure – 158 out of 163 tapes had been released during the litigation – it found that none of these were obtained as a result of "'a judgment on the merits' or 'a court-ordered consent decree.'" *Davis IV*, 460 F.3d at 105-06, citing *OCAW* at 457. It noted that in 1991 he had secured such a judgment from the District Court ordering release of the tapes, but it discounted that because it had reversed the District Court's order in *Davis I*, and on remand the FBI had not made the release pursuant to any order; rather it released the tapes after it determined that they had actually been played at trial. It ignored the facts that it remanded the case to District Court to allow Davis to make that showing, and that after initially stating that it was going to dismiss the case, the District Court issued a show cause order to allow Davis to make such a showing.

Secondly, although it acknowledged that in *Davis II* it had remanded to allow the District Court to determine

whether the withheld tapes contained segregable, nonexempt material, the Court of Appeals ruled in *Davis IV* that "such a remand was insufficient to satisfy the *OCAW* test. *Id.* at 106, citing *OCAW* for the proposition that "an order directing the government to review documents by a specified date did not qualify the plaintiffs as 'prevailing' because it did 'not order[] the [agency] to turn over the documents' or 'disallow any of the [agency's] justification for exempting documents or portions of documents from disclosure.'" *Id.*, n.13.

Thirdly, *Davis IV* ruled that the FBI's release of a tape after it determined that the speaker was dead, "similarly was not pursuant to a judgment or order." *Id.* It disregarded the fact that that disclosure was made after it had remanded the case for a determination of whether there were any segrebable nonexempt portions of the tapes.

Finally, the Court of Appeals rejected Davis' contention that it had wrongly decided the *OCAW* case, saying that it did not have authority to overrule another three-judge panel of the Court. *Id.*, citing *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). It did not explain how, based on that principle, the *OCAW* court could overturn the decision of numerous three-judge panels which had applied the catalyst theory to FOIA cases based on a Supreme Court case that did not involve the same statute or legal issues.

REASONS FOR GRANTING THE PETITION

This Court should review this case to resolve splits between the circuits, and within the D.C. Circuit, as to 1) resolve whether the "catalyst theory" applies to FOIA

cases any longer in light of *Buckhannon*, and 2) if *Buckhannon* does apply to FOIA cases, to resolve splits between the circuits, and within the D.C. Circuit, on how to apply *Buckhannon*.

Additionally, this Court should grant certiorari because of the importance of the issue to the viability of the FOIA, a law critical to fostering the goals of the First Amendment and to affording a vital mechanism for oversight of government operations and activities.

A. The Splits Between and Within the Circuits

1. The Split as to Whether to Extend *Buckhannon* to FOIA Cases

For three decades a multitude of courts have routinely applied the "catalyst theory" to FOIA attorney's fees cases. These decisions are still in place in many circuits. While panels in the D.C. Circuit and the Second Circuit have extended *Buckhannon* to FOIA cases, no *en banc* decision in these circuits has sustained or overridden the post-*Buckhannon* rulings. In addition, one district court in the Sixth Circuit has continued to apply the "catalyst theory" to FOIA cases in a post-*Buckhannon* decision. *See Comer v. IRS*, 2002 WL 31835437 (E.D. Mich. 2002), cited in *Auto Alliance Intern., Inc. v. U.S. Customs Service*, 300 F. Supp. 2d 509, 513, n.3 (E.D. Mich., Southern Div. 2004). *Comer* ruled that a FOIA plaintiff "need not win a lawsuit or receive a court order compelling the government to produce the requested documents to fees and costs. *Id.* at p. 1, citing *Dixie Fuel Co. v. Callahan,* 136 F. Supp. 2d 659 (E.D. Ky. 2001). *Comer* relied on Sixth Circuit precedent and traditional "catalyst theory" factors in holding that a FOIA plaintiff will have "substantially prevailed" by "(1)

proving that the filing of the FOIA action was reasonably necessary to obtain the information sought; and (2) proving that the action had a substantial causative effect on an ultimate receipt of that information." *Id.*, citing *Dixie* at 662 (citing *GMRI, Inc. v. E.E.O.C.*, 149 F.3d 449, 451-52 (6th Cir. 1998)).

The fact that in most if not all circuits there are solid precedents applying the "catalyst theory" to FOIA cases means that in those circuits there is a split between the post-*Buckhannon* panels and the pre-*Buckhannon* panels as to whether the "catalyst theory" applies to FOIA cases. For example, in the D.C. Circuit there is a split between *Cuneo v. Rumsfeld*, 553 F.2d 360 (D.C. Cir. 1977), and its multitudinous progeny, and *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002), and the several cases which have followed it. Similarly, in the Second Circuit, there is a split between the panels which decided *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976) and *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200 (2d Cir. 2003).

2. The Splits Between and Within the Circuits As to How to Apply *Buckhannon* to FOIA Cases

In addition to the conflict over whether *Buckhannon* applies to FOIA cases, there is also a second internal conflict within the D.C. Circuit and other circuits over how to apply *Buckhannon*. For example, in *Davy v. C.I.A.*, 456 F.3d 162, 165-67 (D.C. Cir. 2006), the D.C. Circuit ruled that the plaintiff had substantially prevailed because the District Court had issued an order requiring the agency to release records by a certain date. As *Davy* analyzed it, the

District Court's order had changed the legal relationship between the parties, and because the agency then released some records, he "was awarded some relief on the merits." *Id.* at 165. The same circumstances presented themselves here. The *Davis II* remand required the FBI to do a segregability analysis. This is the functional equivalent of the order issued in *Davy*. In *Davy* the CIA also had to do a segregability analysis and release nonexempt material. Thus, *Davy* and *Davis IV* are in conflict.

Other cases reflect this conflict over how to apply *Buckhannon*. In essence, the conflict is between those courts which read *Buckhannon*'s language narrowly to require an enforceable judgment on the merits or a court-ordered consent decree and those which interpret *Buckhannon* broadly by referring to its holding that "prevailing party" status depends on whether or not there has been a judicially sanctioned "change in the relationship of the parties."

B. The Issues in this Case Are of Exceptional Importance

The issues in this case are of exceptional importance because they go directly to the heart of whether the FOIA is going to continue to be an effective vehicle in the implementation of the First Amendment and a robust mechanism for providing oversight of government operations and activities. This Court has recently noted the importance of this to our nation:

> FOIA is often explained a a means for citizens to know "'what their Government is up to.'" [citation omitted] This phrase should not be

> dismissed as a convenient formalism. It defines a structural necessity in a real democracy.

National Archives and Records Admin. v. Favish, 541 U.S. 157, 172 (2006).

Whether a law of such importance to our democracy is viable depends very much, however, on the availability of an attorney's fees in appropriate cases because this is the primary enforcement mechanism which a citizen has against the government.

When originally enacted, the FOIA was ineffective. A major problem was the absence of reimbursement for attorney's fees and costs for successful plaintiffs. Recognizing this, Congress amended the FOIA in 1974 to include the provision that "substantially prevail[ing]" plaintiffs were eligible for attorney's fees in certain kinds of cases. After that, the FOIA became a much more effective tool promoting the national policy of maximum disclosure of government information mandated by Congress. Part of the reason the FOIA has been used to a much greater extent after 1974 than before is due to the attorney's fees provision and the fact that the courts construing the provision applied the catalyst theory.

Thus, the extension of the non-FOIA *Buckhannon* precedent to FOIA cases has serious implications for the national policy of encouraging citizens to act as private attorneys general vindicating their right to obtain government information. The fact that *Davis IV* decision was handed down by the D.C. Circuit further adds to the need to address the questions raised by it because the D.C. Circuit's rulings have a dominant impact on FOIA law due

to the fact that a particularly large number of FOIA decisions are brought in the District of Columbia.[1] Furthermore, courts in other circuits tend to follow D.C. Circuit FOIA law. *See, e.g., Copper Camerion Corp. v. Department of Labor*, 280 F.3d 539, 543 (5th Cir. 2002) (describing the D.C. Circuit as "the federal appellate court with the most experience in FOIA cases"); *Ingle v. Department of Justice*, 698 F.2d 259, 263 (6th Cir. 1983) (describing the D.C. Circuit as "the forum most frequently confronting FOIA issues").

ARGUMENT

I. THE D.C. CIRCUIT WRONGLY EXTENDED *BUCKHANNON* TO FOIA CASES

In its *OCAW* decision extending the ruling in *Buckhannon* to FOIA cases, the D.C. Circuit overturned a construction of the FOIA attorney's fees provision that had almost universally prevailed in all circuits for three decades. To reach its result, *OCAW* interpreted two differently worded statutory phrases as equivalents, disregarded the different statutory goals sought by the civil rights statutes at issue in *Buckhannon* and those to be enforced by the FOIA, ignored the different realities between civil rights litigation and FOIA lawsuits, and

[1] The Justice Department publishes a list of all FOIA decisions since the Act's inception. In 2002, when it last published this list, 535 lawsuits had been the subject of attorney's fees decisions. Of these, 158, or approximately 30%, were filed in the United States District Court for the District of Columbia. See *Freedom of Information Case List* (May 2002 Edition), published by the Office of Information and Privacy, U.S. Department of Justice.

disregarded thirty years of consistent interpretation of the legislative history of the FOIA attorney's fees amendments as indicating that the "catalyst theory" was to be employed in determining eligibility for attorney's fees in FOIA cases. In short, *OCAW* was wrongly decided. It must be reversed in order to restore uniformity in the legal decisions governing eligibility for attorney's fees in FOIA cases and to make the standard for eligibility for such fees consistent with the goals Congress sought to achieve in enacting the FOIA and providing for attorney's fees to enforce its mandate.

A. "Prevailing Party" and "Substantially Prevailed" Are Not Functionally Equivalent Phrases

OCAW based its extension of *Buckhannon* to FOIA cases on its conclusion that the phrase "substantially prevailed" used in the FOIA attorney's fees provision was the "functional equivalent" of the term "prevailing party" which was employed in the civil rights statutes at issue in *Buckhannon*. But in fact, the meaning of these two phrases is far different. In *Buckhannon*, this Court found that the term "prevailing party" was a term of art defined in *Black's Law Dictionary*. The FOIA's attorney's fees provision refers, however, to a party who has "substantially prevailed." There is no definition for this phrase in *Black's Law Dictionary*.

In seeking to determine the ordinary meaning of this term, the first definition given in a dictionary is: "1) *a*: consisting or relating to substance *b*: not imaginary or illusory: REAL, TRUE *c*: IMPORTANT, ESSENTIAL." *Merriam-Webster's Collegiate Dictionary* (Eleventh Edition). This definition is consistent with the "catalyst theory,"

but not with the construction of "prevailing party" set forth in *Buckannon*. Rather, all that is required for a FOIA plaintiff to "substantially prevail" is that the lawsuit cause the release of information, that the plaintiff prevail in a way that is not "imaginary" or "illusory" but "real." Thus, the formalistic requirements of the "prevailing party" definition given in *Buckhannon* are not required.

This different concept is particularly apt for FOIA cases because it permits courts to assess the realities of what happened in the legal proceedings in ways which are not possible under the formalistic requirements of *Buckhannon*'s "prevailing party" standard. FOIA is a unique statute, far different from the civil rights statutes involved in *Buckhannon*. For one thing, the most powerful enforcement mechanisms of the FOIA are the provisions that the government must shoulder the burden of proof and that showing is subject to *de novo* review by the District Court. What this means in the FOIA context is that a plaintiff rarely gets a clear-cut judgment on the merits. What actually happens in many if not most cases is that the government fails to meet its burden of proof, then disgorges records without the Court having to actually order their release. In this situation, the litigation has had the result desired by Congress. It has forced the government to release information not clearly exempt, but there has been no "judgment on the merits" as required by *Buckhannon* and *OCAW*. Plaintiff's victory is real, not illusory, but he is not entitled to fees under the formalistic *Buckhannon* standard.

B. The Legislative History of the FOIA Attorney's Fees Amendments Show Congress Intended to Apply the "Catalyst Theory"

The FOIA's attorney fees provision was enacted as part of the 1974 amendments to the Act. Congress added the attorney's fees provision because without such a provision the original Act was so ineffectual it was barely utilized. The legislative history of the provision shows that Congress considered it to be of fundamental importance to the Act's viability. "Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to review agency refusals to adhere strictly to the act's mandates." S.Rep. No. 92-854, 93d Cong., 2d Sess. (1974). The Senate Report also notes that "[t]oo often the barriers presented by court costs and attorney's fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law." *Id.*

Indeed, the Senate report noted that even the news media's access to information was affected by the lack of compensation for fees incurred during successful litigation, quoting a statement by the National Newspaper Association that:

> An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOIA matters in the courts once an Agency has decided against making information available. This is probably the most undermining aspect of existing law and severely limits the use of the FOI Act by the media, but specially by smaller sized newspapers.

Id.

The legislative history of the attorney's fees provision clearly indicates that Congress rejected the proposition that an enforceable judgment must be obtained before a FOIA plaintiff is eligible for an award of attorney's fees. The attorney's fees amendment originated in a report of the House Committee on Government Operations, H. Rep. No. 92-1419 (92 Cong., 2d Sess) (reprinted in *Freedom of Infor-mation Act and Amendments of 1974* (94th Cong., 1st Sess.) (March 1975) ("*Leg. History*"), p. 3. It recommended that:

> Court costs and reasonable attorney fees should be awarded, in the discretion of the court, to the complainant *if the court issues an injunction or order against the Government agency* on a finding that the information sought was improperly withheld from the complainant.

Leg. Hist. 90 (emphasis added). However, as passed by the House, H.R. 12471 provided in § 1(e) that:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred *in any case under this section in which the United States* or an officer or agency thereof, as litigant, *has not prevailed.*

Leg. Hist. 147 (emphasis added). The section-by-section analysis of the House Report, H.Rep. No. 93-876, U.S. Code Cong. & Admin. News, 1974, pp. 6267, 6276, stated that under this provision the "assessment of fees and costs *is at the option of the court.*" The Senate Bill, S. 2543, which was enacted, changed this by providing that fees and costs could be awarded "in any case in which the complainant *has substantially prevailed.*" *Leg. Hist.* 202-03. The bill also provided four criteria to guide the court's discretion in ruling on entilement to fees. *Id.*

Senate Report No. 93-854 explained this provision of the bill as follows:

> Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an importanat public policy. In such case it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fees to make the government comply with the law.

Leg. Hist. 171. The Conference Committee proposed a similar version, which was adopted. It explained that by eliminating the four criteria which the Senate Bill employed to guide a court's discretion on the award of fees, "the conferees do not intend to make the award of attorney's fees automatic or to preclude the courts, in exercising their discretion, . . . to take into account such criteria." *Leg. Hist.* 227.

Thus, the legislative history clearly indicates that Congress rejected the kind of formalistic test set forth by *Buckhannon*, the kind of standard set forth in the 1972 House Report, in favor of a test based on causation, on proving that the government's release of records was substantially caused by the lawsuit, the standard enacted when Congress passed S. 2543. The legislative history shows that Congress intended to give the district courts the kind of flexibility to award fees that is severely restricted by the *Buckhannon* standard. In short, the legislative history clearly indicates that the "catalyst theory" is the appropriate measure of whether a FOIA plaintiff is eligible for an award of fees. This was recognized early on in the seminal case of *Vermont Low Income Advocacy*

Council v. Usery, 546 F.2d 509, 513 (2d Cir. 1976), and in *Cuneo v. Rumsfeld*, 553 F.2d 360 (D.C. Cir. 1977).

C. Prior to OCAW, the Courts Recognized that Requiring a Judgment or Court Order to Become Eligible for an Award of Attorney's Fees *Would Undermine the Enforcement and Purpose of the FOIA*

Prior to *OCAW*, cases construing the FOIA's attorney's fees provision recognized that formalistic requirement that an order or judgment be obtained in order to "substantially prevail" undermined the FOIA's effectiveness. In *Cuneo*, the D.C. Circuit approved district court decision holding that eligibility must be governed by a practical Determination of whether the lawsuit had served as a catalyst or cause of disclosure if FOIA's goals were to be promoted. It cited *Goldstein v. Levi*, 415 F. Supp. 303 (D.D.C. 1976), which held that the purpose of the attorney's fees provision was to encourage private citizens to bring to the attention of the courts any unlawful withholding of information by government agencies and found that this purpose "would be defeated by and frustrated if complainants were forced to forfeit their claim for fees upon the surrender of material before formal action by the court" *Cuneo*, at 1364-65, citing *Goldstein* at 305.

Cuneo also endorsed the views of Judge Thomas Flannery on the reasons why formal court action should not be necessary for an award of fees in FOIA cases, quoting him as follows:

> [i]f the government could avoid liability for fees merely by conceding the case before final judgment, the impact of the fee provision would be greatly reduced. The government would remain

> free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking.

Cuneo at 1364, quoting *Communist Party of the United States v. Department of Justice*, No. 75-1770, slip op. at 3 (D.D.C. March 23, 1976).

Early on, other circuits also recognized the need to apply a "catalyst theory" to foster FOIA's goals. In *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976), Judge Friendly wrote a seminal opinion in which he stated:

> to take an extreme example, Congress clearly did not mean that where the FOIA suit had gone to trial and the judge was about to rule for the plaintiff, the Government could abort an award of attorney fees by an eleventh hour tender of the information requested.

As *Vermont* also observes, the legislative history of the 1974 amendments shows that Congress took note of the unique role FOIA plaintiffs play in vindicating the public policy, saying that "[g]enerally, if a plaintiff has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy." *Id.* at 512. Thus, the Second Circuit said, "[i]n such cases it would seem tantamount to a penalty to require the wronged citizen to pay his own attorneys' fee to make the government comply with the law." *Id.*

Although in the *Davy* case the D.C. Circuit found that Davy was eligible for an award of attorney's fees, the Court's reliance on a *Buckhannon* rationale in that case

provides an important example of the reasons why *Buckhannon* is fundamentally flawed when applied to FOIA cases. *Davy* involved a plaintiff who initially submitted his FOIA request *pro se*. The CIA waited for nearly six years, the period of limitations on a FOIA request, then denied his request on the ground that it was unable to confirm or deny the existence of records relating to projects QK/ENCANT and ZR/CLIFF. When Davy filed suit, the Agency dropped its "*Glomar*" defense and said it would process the records. The court set a schedule for it to do so. It then released some records. The D.C. Circuit found that the Court's scheduling order was sufficient under *Buckhannon* to make Davy a substantially prevailing plaintiff.

But suppose that there had been no scheduling order, that the CIA suddenly after more than six years delay forked over the documents? Under *Buckhannon*, as interpreted by the D.C. Circuit, he would not be eligible for an award of attorneys fees. But he would still be a citizen who had expended fees and costs to obtain information that had wrongfully been withheld by Congress. Under the "catalyst theory," the act of filing the lawsuit would have been the causative act which produced the documents, and even under this scenario Davy would be eligible for fees. But not under *Buckhannon*. Clearly, Congress did not intend this kind of result for this hypothetical. The myriad of courts which have applied the "catalyst theory" to FOIA cases over the past three decades recognized this.

II. ASSUMING THAT *BUCKHANNON* APPLIES TO FOIA CASES, THE D.C. CIRCUIT APPLIED IT INCORRECTLY IN THIS CASE

Davis IV ruled that Davis did not "substantially prevail" because none of the tapes he obtained were

produced as a result of a "judgment on the merits" or a "court-ordered" consent decree. 460 F.3d at ___. It conceded that the District Court initially ordered the release of all tapes but points out that *Davis I* reversed that judgment. It then stated that the subsequent release of 157 tapes "was not made pursuant to any judgment or order." *Id.*

But this is not accurate. If Davis had obtained no relief, he would have been out-of-court after the *Davis I* decision without obtaining anything. Rather, the Court of Appeals remanded the case to allow Davis to meet the burden of going forward test that it had decreed. Had Davis not obtained that remand order, he would not have been given any tapes at all.

The remand order in *Davis IV* met the *Buckhannon* standard, which requires that there must have been a "judicially sanctioned change in the relationship of the parties." *Buckhannon* at 605. The remand order changed the relationship of the parties because it permitted plaintiff to meet the burden of going forward with the evidence imposed by the Court rather than simply reversing the District Court and leaving Davis without any remedy. Additionally, after remand, the District Court scheduled a status call at which he announced he was going to dismiss the case because the Court of Appeals had placed an impossible burden on Davis. Davis' counsel requested an opportunity to meet the burden. The District Court then issued an order to show cause why the case should not be dismissed. After Davis made that showing, the FBI released 157 tapes, thus providing relief on the merits as a result of the Court's order.

Davis IV also ruled that the *Davis II* remand did not qualify under *OCAW*. The *Davis II* remand instructed the District Court to conduct a segregability analysis. *Davis IV* said this did not qualify under *OCAW* because it "did not order[] the [Agency] to turn over any documents" or "disallow any of the [agency's] justifications for exempting documents or portions of documents from disclosure." 460 F.3d at ___. (Slip op. at 23).

However, the *Davis II* remand did change the relationship of the parties. The posture of the FBI in the Court of Appeals was that the District Court had awarded it summary judgment. That should be affirmed and the case was over. But the Court's remand order rejected the FBI's justifications for its summary judgment award and placed an affirmative obligation on it to do a segregability analysis.

The *Davis IV* ruling on this point is in conflict with the D.C. Circuit's holding in *Davy v. C.I.A.*, 456 F.3d 162, 165-67 (D.C. Cir. 2007), which held that the plaintiff there had "substantially prevailed" because the District Court had issued an order requiring the Agency to release nonexempt records by a certain date. As the *Davy* court analyzed it, the District Court's order had changed the legal relationship between the parties, and because the agency then disclosed some records, *Davy* was awarded "some relief on the merits." *Id.* at 165.

The same circumstances are at issue in this case. The *Davis II* remand order requiring the FBI to do a segregability analysis is the functional equivalent of the order issued in *Davy*. In *Davy*, the CIA also had to do a segregability analysis and release nonexempt documents.

Thus, the *Davy* and *Davis* decisions are in conflict. Clearly, the D.C. Circuit is in need of guidance from this Court as to how its decision in *Buckhannon* is to be applied.

CONCLUSION

For the reasons set forth above, this Court should grant Davis' petition for a writ of certiorari to the District of Columbia Circuit so it may review this case.

Respectfully submitted,

JAMES H. LESAR
1003 K Street, N.W.
Suite 640
Washington, D.C. 20001

Attorney for Petitioner
John Davis

460 F.3d 92

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 13, 2006 Decided August 22, 2006

No. 04-5406

JOHN DAVIS,
APPELLANT

v.

DEPARTMENT OF JUSTICE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 88cv00130)

James H. Lesar argued the cause and filed the briefs for appellant.

Heather Graham-Oliver, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Kenneth L. Wainstein*, U.S. Attorney, and *Michael J. Ryan*, Assistant U.S. Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: This case involves four audiotapes recorded more than twenty-five years ago during an FBI corruption investigation in Louisiana. The plaintiff, an author, seeks release of the tapes under the

Freedom of Information Act (FOIA), 5 U.S.C. § 552. There are two speakers on the tapes, one a "prominent individual" who was a subject of the FBI's investigation, and the other an "undercover informant" in that investigation. The only question on this appeal is whether the FBI has undertaken reasonable steps to determine whether the speakers are now dead, in which event the privacy interests weighing against release would be diminished.

The FBI has not been able to determine whether either speaker is dead or alive. It says it cannot determine whether the speakers are over 100 years old (and thus presumed dead under FBI practice), because neither mentioned his birth date during the conversations that were surreptitiously recorded. It says it cannot determine whether the speakers are dead by referring to a Social Security database, because neither announced his social security number during the conversations. And it declines to search its own files for the speakers' birth dates or social security numbers, because that is not its practice. The Bureau does not appear to have contemplated other ways of determining whether the speakers are dead, such as Googling them.[1]

We conclude that the FBI has not "made a reasonable effort to ascertain" whether the two speakers, on whose behalf it has invoked a privacy exemption from FOIA, are living or dead. *Schrecker v. Dep't of Justice,* 349 F.3d 657, 662 (D.C. Cir. 2003) ("*Schrecker II*"). As a consequence, there is a serious "'question whether the Bureau's invocation of the

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[1] *See* Oxford English Dictionary Online, http://www.oed.com (defining "Google" as "to use the Google search engine to find information on the Internet").

privacy interest represented a reasonable response to the FOIA request.'" *Id.* (quoting *Summers v. Dep't of Justice,* 140 F.3d 1077, 1085 (D.C. Cir. 2003) (Williams, J., concurring)). We therefore reverse the district court's dismissal of the plaintiff's FOIA complaint and remand for further proceedings.

I

This is the fourth time we have considered an appeal arising out of the FOIA dispute between Davis and the FBI. In 1986, Davis submitted a FOIA request for all audiotapes recorded during an FBI criminal investigation known as "BRILAB." That investigation, conducted during 1979-80, concerned bribery and racketeering activities among organized crime figures, politicians, and labor unions in Louisiana. The investigation led to the indictment of five individuals, two of whom were ultimately convicted – including reputed Mafia boss Carlos Marcello.[2] Portions of more than 130 BRILAB tape recordings were played at the defendants' 1981 trial. Davis sought the tapes as background for a book he subsequently published in 1989. *See* JOHN H. DAVIS, MAFIA KINGFISH: CARLOS MARCELLO AND THE ASSASSINATION OF JOHN F. KENNEDY (McGraw-Hill 1989).

After the government refused to release the tapes, Davis brought suit pursuant to FOIA. *See* 5 U.S.C. § 552(a)(4)(B). The government contended that each tape was properly withheld under one or more statutory exemptions, but the district court concluded that material

[2] The convictions were later overturned on collateral review. *See United States v. Marcello,* 876 F.2d 1147 (5th Cir. 1989).

"unconditionally revealed in open court . . . enter[s] the public domain beyond recall for all time" and therefore cannot be withheld under FOIA. *Davis v. Dep't of Justice,* No. 88-0130, Order at 3 (D.D.C. May 6, 1991). Although the government argued that it was no longer possible to determine which of a "play list" of 163 taped excerpts had actually been played in the courtroom, the district court held that the government bore the burden of showing that the tapes had not entered the public record and must "suffer the consequences of the impasse." *Id.* at 4. The court ordered release of all the tapes.

On appeal, this court reversed. *See Davis v. Dep't of Justice,* 968 F.2d 1276, 1282 (D.C. Cir. 1992) ("*Davis I*"). We held that, while the ultimate burden of persuasion remains on the government, "a party who asserts that material is publicly available carries the burden of production on that issue." *Davis I,* 968 F.2d at 1279 (emphasis omitted). We then remanded to give Davis an opportunity to show that the tapes he sought, or portions of them, were played at the trial. *Id.* at 1282.

In an effort to meet his burden under *Davis I,* Davis produced docket entries and transcripts from the Marcello trial. In response, the FBI released 157 of the 163 tapes and said it would have released another tape but could not find it. The FBI continued to withhold the five remaining tapes on the basis of FOIA Exemption 7(C), which permits an agency to withhold otherwise disclosable records if they were "compiled for law enforcement purposes" and their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552(b)(7)(C). The district court sustained the FBI's actions. *See Davis v. Dep't of Justice,* No. 88-0130, Order at 15 (D.D.C. Oct. 16, 1997).

Davis appealed a second time. In *Davis II,* we upheld the district court's determination that the FBI's search for the missing tape was adequate. *See Davis v. Dep't of Justice,* 1998 WL 545422, at *1 (D.C. Cir. July 31, 1998) ("*Davis II*"). We again remanded, however, this time for the court to determine "whether any of the five tapes withheld in their entirety . . . contains material that can be segregated and disclosed without unwarrantably impinging upon anyone's privacy." *Id.*

On remand, the FBI determined that it could release one of the five tapes because the principal speaker on the tape had died. But the Bureau concluded that the remaining four tapes were wholly subject to Exemption 7(C), because it could not determine whether the speakers on those tapes were living or dead. *See* Decl. of Scott A. Hodes ¶¶ 5, 7 (Nov. 24, 1998). Citing an FBI affidavit, *see id.* ¶ 7, the district court held that the "defendant has made adequate efforts to establish that the speakers on these tapes are not deceased." *Davis v. Dep't of Justice,* No. 88-0130, Order at 2 (D.D.C. Sept. 15, 2000).

Once again, Davis appealed. In *Davis III,* we summarily reversed the district court and again remanded the case. *See Davis v. Dep't of Justice,* 2001 WL 1488882, at *1 (D.C. Cir. Oct. 17, 2001) ("*Davis III*"). "The FBI's affidavit," we held, was "insufficient to determine the extent of the Bureau's efforts to ascertain whether putative beneficiaries of Exemption 7(C) are alive or dead." *Id.* As a consequence, we were "unable to say 'whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue.'" *Id.* (quoting *Schrecker v. Dep't of Justice,* 254 F.3d 162, 167 (D.C. Cir. 2001) ("*Schrecker I*")). Citing our recent opinion in *Schrecker v. Department of Justice*, we remanded

so that "the FBI may document what sources it consulted, and the district court can decide in the first instance whether the government 'did all it should have done, and whether it may withhold the disputed information pursuant to Exemption 7(C).'" *Id.* (quoting *Schrecker I,* 254 F.3d at 167).

Following our remand order, the FBI filed two more affidavits, spelling out the steps it took to determine whether the speakers were dead or alive, and declaring that those steps did not establish that the speakers on the tapes were deceased. *See* Second Decl. of Scott A. Hodes (Feb. 26, 2002); Third Decl. of Scott A. Hodes (July 11, 2002). We detail those steps in Part II.A below. The FBI's filings make clear that there are only "two speakers on the audiotapes at issue." Def.'s Mot. for Recons. at 3 (citing Fourth Decl. of Scott A. Hodes ¶ 4 (Aug. 7, 2002)). According to the government, the four tapes come from the FBI's undercover investigation of a "prominent individual," and the speakers are that "prominent individual and the undercover informant." Appellee's Br. 11 (citing affidavits).

In July 2002, unsatisfied with the government's efforts, the district court ordered the FBI to advise each of the two speakers, "by first class mail[,] . . . of defendant's obligation pursuant to this Order to [release the tapes] unless the speaker objects thereto in writing within 30 days." *Davis v. Dep't of Justice,* No. 88-0130, Order at 1 (D.D.C. July 23, 2002). More than a year later, after this court issued a subsequent opinion in the *Schrecker* case, *see Schrecker II,* 349 F.3d at 657, the government asked the district court to reconsider that order. On August 31, 2004, the court granted the motion to reconsider, "relieve[d] the government from undertaking the additional tasks mandated" in its July 2002 order, and granted

summary judgment in favor of the FBI. *Davis v. Dep't of Justice,* No. 88-0130, Order at 1 (D.D.C. Aug 31, 2004).

Davis then filed his fourth notice of appeal, challenging both the district court's grant of summary judgment dismissing his FOIA complaint, and an earlier order denying his motion for an award of attorney's fees. We consider the former in Part II and the latter in Part III. We "review de novo a decision granting summary judgment to an agency claiming to have complied with FOIA." *Schrecker II,* 349 F.3d at 661-62. We also review de novo a district court's attorney's fees determination, like the one at issue here, that "rests on an interpretation of the statutory terms that define eligibility for an award." *Edmonds v. FBI,* 417 F.3d 1319, 1322 (D.C. Cir. 2005) (internal quotation marks omitted).

II

FOIA Exemption 7(C) exempts law enforcement records from release "to the extent that" release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In deciding whether the release of particular information constitutes an "unwarranted" invasion of privacy, an agency must balance the privacy interest at stake against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 777 (1989); *Schrecker I,* 254 F.3d at 166. We have recognized "that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased." *Schrecker II,* 349 F.3d at 661. Indeed, the "fact of death, . . . while not requiring the release of information, is a relevant factor to be taken into account in the

balancing decision whether to release information." *Id.* (quoting *Schrecker I,* 254 F.3d at 166). Consequently, "without confirmation that the Government took certain basic steps to ascertain whether an individual was dead or alive, we are unable to say whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue." *Schrecker I,* 254 F.3d at 167.

The government's obligation in this regard is to "ma[k]e a reasonable effort to ascertain life status." *Schrecker II,* 349 F.3d at 662. Its "efforts must be assessed in light of the accessibility of the relevant information." *Id.* As we said in *Schrecker II,* there "'would be a question whether the Bureau's invocation of the privacy interest represented a reasonable response to the FOIA request . . . *if the Bureau has, or has ready access to, data bases that could resolve the issue.*'" *Id.* (quoting *Summers,* 140 F.3d at 1085 (Williams, J., concurring)) (emphasis added in *Schrecker II*). In short, "the proper inquiry is whether the Government has made reasonable use of the information readily available to it, and whether there exist reasonable alternative methods that the Government failed to employ." *Schrecker II,* 349 F.3d at 662.

A

The government's affidavits and pleadings declare that the FBI took three steps to determine whether the two speakers on the tapes were deceased. The Bureau reports that, because those individuals' deaths could not "be ascertained" by these methods, "the four tapes were withheld in full pursuant to exemption b(7)(C)." Second Hodes Decl. ¶ 8. Of course, "[t]he failure to discover the

information sought is not conclusive evidence that the agency has failed to make a reasonable effort." *Schrecker II,* 349 F.3d at 662. Here, however, the government's own declarations provide that evidence.[3]

1. The government describes the first method it employed in the following paragraph from its principal affidavit:

> The FBI has institutional knowledge of the death of certain individuals from the processing of prior FOIA requests or internal records. The FBI relies on this institutional knowledge, as well as *Who Was Who,* a book of famous individuals [who have died].

Second Hodes Decl ¶ 5. From this description, it appears that the government's first step involved resort to two different sources: institutional knowledge and *Who Was Who.*

If the FBI truly used its "institutional knowledge" to determine whether the speakers were dead or alive, this first step might well be reasonable. But the Bureau's method of accessing that knowledge is so constrained as to render it effectively useless. Although the affidavit could be read as suggesting that the FBI uses its "internal records" to determine an individual's status, the same affidavit indicates that the Bureau did *not* search any records that were not themselves "responsive" to Davis' FOIA request – that is, it did not search any records other than the audiotapes themselves. *See* Second Hodes Decl.

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[3] We measure the reasonable sufficiency of the government's effort on the basis of the aggregate of the steps it took, not on the basis of any individual step alone.

¶¶ 6, 7.[4] Needless to say, the tapes themselves disclose nothing on this point, other than that the speakers were alive when they were speaking sometime during 1979-80.

The only other piece of "institutional knowledge" mentioned in the FBI's description is knowledge gained from "the processing of prior FOIA requests." Second Hodes Decl. ¶ 5. We have no idea what that means. On its face, however, its utility must depend upon there having been a prior FOIA request involving the same individuals. The FBI does not suggest that there had ever been such a request.

If the FBI's reference to its institutional knowledge means anything more than what we have just described, we cannot determine that from the affidavit the Bureau filed. What we said of an earlier affidavit in this case, one that made a similar reference to the FBI's "institutional knowledge," remains equally true regarding this affidavit's treatment of that subject: "The FBI's affidavit is insufficient to determine the extent of the Bureau's efforts to ascertain whether putative beneficiaries of Exemption 7(C) are alive or dead." *Davis III,* 2001 WL 1488882, at *1. Indeed, with respect to the FBI's reliance on its institutional knowledge, it appears that the Bureau has "been completely passive on the issue, taking death into account only if the fact has happened to swim into [its agents'] line

[4] Subsequently, the FBI did conduct one search of its internal records. According to another affidavit, the FBI searched a specific index in its Criminal Justice Information Service Division for the names of the speakers. However, "the only individuals . . . within the index[] are those whose fingerprints are taken from corpses by law enforcement personnel." Third Hodes Decl. ¶ 4. There was no reason – - or at least none has been offered – to suggest that a search of this index was likely to be productive, and apparently it was not.

of vision." *Summers,* 140 F.3d at 1085 (Williams, J., concurring); *see also Schrecker I,* 254 F.3d at 167 (reversing and remanding the district court's judgment regarding the applicability of Exemption 7(C) because the FBI's affidavit was too vague to determine if the agency had taken "certain basic steps to ascertain whether an individual was dead or alive").

The other source mentioned in the FBI's affidavit is *Who Was Who,* a multi-volume set of books published periodically by Marquis Who's Who, LLC. Each new volume "includes the biographies of the most prominent and noteworthy people who have died since the publication of the previous edition."[5] It is a select company: of the more than 7.2 million Americans who died during 2000-02,[6] for example, no more than 4000 are portrayed in the *Who Was Who* volume covering that period. *See* 14 WHO WAS WHO IN AMERICA, 2000-02 (2002). How one earns a place in it is unclear, although Marquis reports that most of the entries were originally listed with the subjects' permission in its sister *Who's Who in America* publication, and that many of the biographies "have been scrutinized and revised by relatives or legal representatives of the deceased Biographee." *Id.* at vi. All of this suggests both considerable self-selection and considerable lag time.

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[5] Marquis Who's Who, LLC, Home Page, http://www.marquiswhos who.com.

[6] Centers for Disease Control and Prevention (CDC), *Deaths: Final Data for 2002,* NAT'L VITAL STAT. REP., Oct. 12, 2004, at 1; CDC, *Deaths: Final Data for 2001,* NAT'L VITAL STAT. REP., Sept. 18, 2003, at 1; CDC, *Deaths: Final Data for 2000,* NAT'L VITAL STAT. REP., Sept. 16, 2002, at 1.

The government describes one of the two speakers at issue here as a "prominent individual" and the other as an "undercover informant." Appellee's Br. 11. The latter seems unlikely to qualify for the distinction of a *Who Was Who* entry, and we have no way of knowing whether the former was prominent enough to qualify. Accordingly, we cannot conclude that the FBI's first method – reference to its institutional knowledge and to *Who Was Who* – was reasonably calculated to determine whether the speakers on the tapes were living or dead.

2. The government describes the second method it employed as follows:

> *When birth dates are provided in responsive records,* and these dates indicate the individual would be over 100 years of age, the name and/or any other identifiers will be released. Although the FBI is aware that many individuals live to be older than 100 years of age, . . . the FBI has consistently relied upon the 100-year rule in all of its FOIA processing.

Second Hodes Decl. ¶ 6 (emphasis added). The key to the utility of the FBI's 100-year rule is the clause that we have italicized. As explained above, when the FBI refers to "responsive records," it means those records – and only those records – actually sought in the FOIA request. In this case, the only responsive records were the audiotapes, and "there were no birth dates on these tapes." Second Hodes Decl. ¶ 6. Therefore, the affidavit concludes, since "no birth dates were provided in the responsive records, the FBI did not assume death of the individuals speaking on these tapes." *Id.*

The reasonableness of this second method obviously depends upon the probability that the responsive records will contain the individual's birth date – as might well be the case if the records sought by the FOIA requester were FBI investigative reports or personnel files. But unless the FBI has tape recorded a birthday party, it seems highly unlikely that the participants in an audiotaped conversation would have announced their ages or dates of birth.[7] Accordingly, this second method was also destined to fail, as it did.

3. The third method the FBI used was the following:

> *If a social security number is revealed on the responsive records,* the FBI, in its administrative discretion, may check the Social Security Death Index (SSDI) – a database maintained by a third party on the Internet. This website is maintained by a private individual, and the FBI cannot verify or vouch for the accuracy of this index, which the website purchases from the Social Security Administration.

Second Hodes Decl. ¶ 7 (emphasis added). Once again, the rub is that the FBI will not even check the Social Security Death Index unless the speaker's social security number is revealed on responsive records. *See id.* (declaring that the "FBI does not research third-party names internally to discover social security" numbers). As expected, the FBI reports that, because "[t]his case concerns audio tapes," and "[a]s no social security numbers are on the tapes at

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[7] Although a tape might also reveal a speaker's birth date if that date were inscribed on the outside of the cassette that holds the tape, the government provides no information as to whether that is ever the case.

issue, this website [the SSDI] was not checked." Needless to say, no one announces his or her social security number in ordinary conversation – not even at a birthday party. Accordingly, the Bureau again utilized a method that could not help but fail in the circumstances of this case.

4. As we have discussed, none of the three methods used by the FBI had any likelihood of discovering whether the two individuals, whose conversations were captured by the audiotapes in question, were living or dead. Indeed, if the FBI limits itself to those methods in the future, it is doubtful that it will ever be able to discover the status of a speaker on an audiotape. Although futility alone may not render the FBI's efforts unreasonable, it surely is an important factor in the equation.

The other factor we must consider is "whether the Government has made reasonable use of the information readily available to it, and whether there exist reasonable alternative methods that the Government failed to employ." *Schrecker II,* 349 F.3d at 662. As we have said, the question is whether "*the Bureau has, or has ready access to, data bases that could resolve the issue.*" *Id.* (internal quotation marks omitted). We now consider some of the alternatives the FBI failed to employ.

Turning first to the FBI's internal records, we cannot conclude that the government "made reasonable use" of its own information in this case. The flaw in the government's 100-year rule and Social Security Death Index methodologies – at least as far as audiotapes are concerned – is that the Bureau refused to look anywhere but in the tapes themselves to discover the speakers' birth dates or social security numbers. This meant that, even if those personal identifiers were present in other FBI records, the FBI

would not have found them. In this case, it is not unlikely that such other records do exist. In an FBI undercover operation like BRILAB, for example, one would expect to find investigative reports that list the various players (witnesses, informants, subjects, targets) and identifying information about them.[8] The FBI's Electronic Surveillance (ELSUR) indices also may well contain the necessary personal identifiers for the two individuals, whose voices were captured by electronic surveillance.[9]

The FBI has neither denied that it has such records nor suggested that it would be difficult to access them in this case. To the contrary, yet another FBI affidavit explains that the Bureau's Central Records System (CRS) contains "all pertinent information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities," and makes clear that much of that system can be searched by an individual's name. Fourth Hodes Decl. ¶ 7. For example, with respect to FBI Headquarters:

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[8] *See, e.g., Blanton v. Dep't of Justice,* 64 Fed. Appx. 787, 788 (D.C. Cir. 2003) (noting that the FBI maintained "informant files" relating to an investigation); *Perri v. United States,* 53 Fed. Cl. 381, 395-96 (2002) (noting that the FBI maintained a "137 (Confidential Informant) File" and a "270 (Cooperative Witness) File" in an undercover operation); *Meeropol v. Meese,* 790 F.2d 942, 947 (D.C. Cir. 1986) (noting that the FBI maintained "subject files" regarding eleven named principals).

[9] *See Wheeler v. Dep't of Justice,* 403 F. Supp. 2d 1, 4 (D.D.C. 2005) (noting that, through ELSUR, "the FBI maintains information on all subjects whose electronic and/or voice communications have been intercepted by the FBI since January 1, 1960," and that ELSUR can be searched by name, "date of birth, place of birth and social security number"); *see also Campbell v. Dep't of Justice,* 164 F.3d 20, 29 (D.C. Cir. 1998) (remanding with instructions that the FBI search its ELSUR records).

> Communications directed to FBIHQ from the various field offices . . . are filed in the pertinent case files and *indexed to the names of individuals,* groups, or organizations *which are listed* in the case caption(s) or title(s) *as a subject*(s), a suspect(s), or as a victim(s). Therefore, for example, *a search made in this index to locate records concerning a particular individual would be made by searching the name of that individual* in the index.

Id. ¶ 8 (emphasis added). And similarly, with respect to FBI field offices:

> Access to the CRS files at FBI field divisions is also afforded by the General Indices (automated and manual), which are likewise arranged in alphabetical order, and consist of an index on various subjects, including the names of individuals and organizations. *Searches made in the General Indices to locate records concerning a particular subject, such as John Doe, are made by searching the subject requested* in the index. Indexing functions have been automated by field divisions.

Id. ¶ 9 (emphasis added).

It is plain, then, that the FBI could have searched its files by the names of the two speakers – one the subject of a criminal investigation, the other an informant – to determine whether records in those files disclose their dates of birth or social security numbers (or even their deaths). But the FBI did not do so. *See* Second Hodes Decl. ¶¶ 6, 7. The Bureau gave no reason at all for not searching its records for the speakers' birth dates, and only one reason for not searching for their social security numbers:

> The FBI does not research third-party names internally to discover social security [numbers] because to do so would violate these third parties' privacy rights. The records that may possess these individual[s'] social security numbers were created for law enforcement purposes; they were not created for the purpose of ascertaining whether individuals contained in FBI records are still alive.

Second Hodes Decl. ¶ 7. We expressly rejected this precise rationale (asserted by the same FBI declarant) in *Schrecker II,* saying: "We fail to see how the purpose for which an internal record was created bears on whether searching the record for an individual's social security number would violate that individual's privacy." 349 F.3d at 664.

Turning from the FBI's own databases to those it "*has ready access to,*" *id.* at 662 (internal quotation marks omitted), we have to ask why the FBI limited itself to *Who Was Who.* The fact that the Bureau uses such an outside source indicates that there is no bar to its doing so. And apparently the biographies of the decedents contained in those books make it possible to determine that the "John Doe" for whom the FBI is searching is the same John Doe whose death is there reported. *See infra* Part II.B.

But if that is so, one has to ask why – in the age of the Internet – the FBI restricts itself to a dead-tree source with a considerable time lag between death and publication, with limited utility for the FBI's purpose, and with entries restricted to a small fraction of even the "prominent and noteworthy"? Why, in short, doesn't the FBI just Google the two names? Surely, in the Internet age, a "reasonable alternative" for finding out whether a prominent

person is dead is to use Google (or any other search engine) to find a report of that person's death.[10] Moreover, while finding a death notice for the second speaker – the informant-may be harder (assuming that he was not prominent), Googling also provides ready access to hundreds of websites collecting obituaries from all over the country, any one of which might resolve that speaker's status as well. *See, e.g.,* http://www.legacy.com (hosting the obituary sites of more than 275 newspapers, including three Louisiana papers); http://www.obituarycentral.com (containing a directory of links to online obituaries and death notices in every state).

We do not suggest that the FBI must use one, or any, of the search methods outlined above. But when the only search methods the FBI did employ were plainly fated to reach a dead end (in a manner of speaking), and when there appear to be reasonable alternatives that the government failed to consider, there is a serious "question whether the Bureau's invocation of the privacy interest represented a reasonable response to the FOIA request." *Schrecker II,* 349 F.3d at 662 (internal quotation marks omitted). This a question that has not yet been answered, and that the district court must address on remand.

B

The government does not dispute that the steps the FBI took to determine whether the speakers on the audiotapes

[10] That is particularly so here, since an FBI affidavit declared that the Bureau knew the "prominent individual" at issue was alive as recently as 1994. Decl. of Robert A. Moran ¶ 19 (Oct. 21, 1994). (How the FBI knew the individual was living in 1994, but could not determine whether he was living or dead by 1998, remains a mystery.)

were dead could not reasonably be expected to answer that question. Nor does it contend that resort to any of the alternatives identified above would be burdensome on the facts of this case. Instead, its argument is simply that "the steps taken by the FBI here were the same taken by the FBI in *Schrecker II*," and that because we affirmed the grant of summary judgment for the government there, we must do so here as well. Appellee's Br. 9; *see* Oral Arg. Tape at 29:15-34:12 (confirming the government's view that the FBI does not have to search for the speakers' birth dates or social security numbers, even if it knows they can quickly be found by a name search, because "there is no obligation under *Schrecker* to conduct additional searches" of nonresponsive records). That is a serious misreading of *Schrecker II*.

It is true that the three methods the FBI employed to determine whether individuals mentioned in responsive records in *Schrecker II* were dead are the same as those it employed in this case. *See Schrecker II,* 349 F.3d at 660. It is also true that we affirmed summary judgment in that case, holding, in particular, that the Bureau did not have to examine nonresponsive internal records for the mentioned individuals' birth dates or social security numbers. *Id.* at 663-65. But *Schrecker II* did not purport to affirm a set of search methodologies as per se sufficient to satisfy the "reasonable efforts" standard. *Id.* at 662. To the contrary, we noted that the "'adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case.'" *Id.* at 663 (quoting *Truitt v. Dep't of State,* 897 F.2d 540, 542 (D.C. Cir. 1990)) (additional quotation marks omitted). And we expressly "cautioned . . . that it would be inappropriate for the court to mandate 'a bright-line set of steps for an

agency to take in this situation,'" because FOIA requires "'both systemic and case-specific exercises of discretion and administrative judgment and expertise.'" *Id.* at 662 (quoting *Johnson v. Executive Office for U.S. Attorneys,* 310 F.3d 771, 776 (D.C. Cir. 2002)).

Our determination in *Schrecker II,* that in that case the FBI had reasonably decided to examine only responsive records for birth dates and social security numbers, is distinguishable from this case in two important respects. First, *Schrecker* involved a FOIA request not for audiotapes, but for documents. Although there is virtually no chance that a speaker will announce those personal identifiers during an oral conversation, there is a reasonable probability that they will be contained in responsive documents. Indeed, in *Schrecker II* itself, the FBI found the birth dates and social security numbers of at least some of the mentioned individuals in a search of responsive pages. 349 F.3d at 663, 664.

Second, at issue in *Schrecker II* were 113 names appearing in over 24,000 responsive documents, making a search of nonresponsive documents for personal identifiers "unduly burdensome." *Id.* at 664. That burden was magnified by the fact that the 113 names were not those of the subjects of an FBI investigation, but rather were merely mentioned in documents relating to that investigation. This meant that "any name-based search would likely encounter . . . duplication" of common names, "making verification difficult or impossible." *Id.* It also meant that the prospects of success were "dubious." *Id.* Under those circumstances, we held that to "require the Government to shoulder such a potentially onerous task . . . goes well beyond the 'reasonable effort' demanded in this context." *Id.*

But Davis' FOIA request entails no such burden. Here, there are only two names and only four responsive records. Those two names belong to the prominent subject of a major FBI investigation, and to the FBI's own undercover informant. Given the Bureau's knowledge of their biographies, even if those individuals have common names, verification that a name-based search has produced records that relate to them would be neither "difficult [n]or impossible." *Id.* While there may be thousands of John Does, there are unlikely to be thousands connected with the BRILAB investigation. And given the fact that the FBI maintains name-specific records regarding its subjects and informants, *see* Fourth Hodes Decl. ¶¶ 8, 9 (quoted *supra* Part II.A.4); cases cited *supra* notes 8 & 9, here a name-based search would not have "dubious prospects of success." *Schrecker II,* 349 F.3d at 664.

Indeed, the request in this case looks less like the one at issue in *Schrecker II* and more like one that *Schrecker II* expressly distinguished. The latter involved another FOIA request by Ellen Schrecker, for documents relating to Joseph Fischetti, a Chicago-based organized-crime figure. As we explained, "Fischetti was the *sole subject* of that FOIA request, not one of a *multitude of third parties* appearing in responsive documents." *Id.* at 664 (emphasis in original). The request in *Schrecker II* was different, we said, because "[w]hile it may be reasonable to pursue internal research to determine whether a single subject is the same individual shown by the [Social Security Death Index] to be deceased, . . . it would be unduly burdensome to require the Government [to] do so for the large number of third parties appearing in documents responsive to Schrecker's request." *Id.* Davis' request, involving only two

names in four audiotapes, is far closer to the *Fischetti* request than to the one we dismissed in *Schrecker II*.[11]

To repeat what we said at the beginning of this subpart, there is no "bright-line set of steps for an agency to take in this situation." *Id.* at 662 (internal quotation marks omitted). Rather, the "adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case." *Id.* at 663 (internal quotation marks omitted). In determining whether an agency's search is reasonable, a court must consider the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives. In this case, the methodology employed by the agency was extremely unlikely to produce the needed information, and it appears – although we do not know for certain – that there are readily available alternatives that would not impose an undue burden on the government. We remand to permit the agency an opportunity to evaluate the alternatives, and either to conduct a further search or to explain satisfactorily why it should not be required to do so.

III

Finally, we address Davis' request for an award of attorney's fees, which the district court denied on the authority of this circuit's decision in *Oil, Chemical &*

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[11] We note the possibility that a FOIA requester could attempt to circumvent this distinction by slicing a single request for many names into multiple requests of one name each. We are confident, however, that a district court would be able to see through such a ruse.

Atomic Workers International Union, AFL-CIO v. Department of Energy, 288 F.3d 452 (D.C. Cir. 2002) ("*OCAW*"). *See Davis,* Order at 2 (July 23, 2002). The district court's denial was correct. *OCAW* forecloses a decision in Davis' favor.

FOIA provides that a district court "may assess against the United States reasonable attorney fees . . . reasonably incurred in any case under this section in which the complainant has *substantially prevailed.*" 5 U.S.C. § 552(a)(4)(E) (emphasis added). In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598 (2001), the Supreme Court construed the attorney's fees provision of two other statutes that permit courts to award fees to a "prevailing party."[12] The Court rejected the plaintiffs' contention, which it characterized as the "catalyst theory," that "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon,* 532 U.S. at 601. Rather, the Court ruled that, for a litigant to be a "prevailing party," there must have been a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. "[E]nforceable judgments on the merits and court-ordered consent decrees," the Court said, suffice to create such a change. *Id.* at 604.

In *OCAW*, this circuit extended the holding of *Buckhannon* to the fee-shifting provision of FOIA. 288 F.3d at 454-57. The *OCAW* court concluded that "the 'substantially

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[12] At issue in *Buckhannon* were provisions of the Fair Housing Amendments Act, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act, 42 U.S.C. § 12205.

prevail' language in FOIA [is] the functional equivalent of the 'prevailing party' language found in" the statutes interpreted in *Buckhannon. Id.* at 455-56. It "therefore h[e]ld that in order for plaintiffs in FOIA actions to become eligible for an award of attorney's fees, *they must have 'been awarded some relief by [a] court,' either in a judgment on the merits or in a court-ordered consent decree." Id.* at 456-57 (quoting *Buckhannon,* 532 U.S. at 603) (emphasis added).

Davis' problem is that, although to date he has received a total of 158 tapes from the government, none were produced as the result of a "judgment on the merits" or a "court-ordered consent decree." *Id.* at 457. It is true that, in 1991, he did secure such a judgment from the district court, directing the FBI to release 163 tapes. But that judgment was reversed by this court in *Davis I,* and the government's subsequent release of 157 of those tapes -- after the FBI determined that they had been played at the trial – was not made pursuant to any judgment or order. Similarly, although *Davis II* remanded for the district court to determine whether any of the remaining tapes contained material that could be segregated, *Davis II,* 1998 WL 545422, at *1, such a remand is insufficient to satisfy the *OCAW* test.[13] The FBI's subsequent release of an additional tape (after determining that the speaker was dead) similarly was not pursuant to a judgment or order.

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[13] *See OCAW,* 288 F.3d at 458 (holding that an order directing the government to review documents by a specified date did not qualify the plaintiffs as "prevailing," because it did "not order[ ] the [agency] to turn over any documents" or "disallow any of the [agency's] justifications for exempting documents, or portions of documents, from disclosure").

Davis appears to recognize the futility of his effort to distinguish *OCAW*, as his brief devotes considerably more pages to arguing that *OCAW* was wrongly decided than to arguing that it can be distinguished. *See* Appellant's Br. 24-28. The former is an argument that we cannot entertain, because "[o]ne three-judge panel . . . does not have the authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry,* 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). We therefore conclude that the district court correctly determined that it could not grant Davis' request for attorney's fees.

IV

For the foregoing reasons, we affirm the district court's denial of attorney's fees, but we reverse its grant of summary judgment dismissing Davis' FOIA complaint. The case is remanded with directions that the FBI evaluate alternative methods for determining whether the speakers on the requested audiotapes are dead, and that thereafter the district court determine whether the FBI's chosen course is reasonable.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DAVIS, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 88-0130

ORDER

(Filed Jul. 23, 2002)

Upon consideration of the pending cross-motions for summary judgment, plaintiff's motion for discovery or other relief, and plaintiff's motion for an award of an attorney's fee, in accordance with proceedings thereon in open court of July 23, 2002, it is this 23rd day of July, 2002,

ORDERED, as follows:

(1) Defendant shall, by first-class mail addressed to each identified *speaker* on tapes nos. 2, 3, 6, and 31 at any last known address for such speaker, promptly advise the speaker of plaintiff's Freedom of Information Act request, and of defendant's obligation pursuant to this Order to comply therewith unless the speaker objects thereto in writing within 30 days;

(2) Defendant shall, within 90 days hereof, release to plaintiff any tapes to which no *speaker* has interposed an objection; provided, however, that defendant

may expurgate, or render indecipherable, any proper names or other indices of the identity of persons mentioned on the tapes who are not currently known to the defendant to be deceased.

IT IS FURTHER ORDERED, that upon completion of the foregoing defendant shall promptly notify the Court, at which time the Court will entertain defendant's motion for summary judgment, but the said motion shall be held in abeyance until then.

IT IS FURTHER ORDERED, that plaintiff's motion for summary judgment [219-1] is denied to the extent inconsistent with the relief ordered above; and it is

FURTHER ORDERED, that plaintiff's motion for discovery or other relief [220] is denied; and it is

FURTHER ORDERED, that plaintiff's motion for an award of an attorney's fee [208-1] is denied. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001); *Oil, Chem. and Atomic workers Int'l Union, AFL-CIO v. Dept. of Energy*, 288 F.3d 452 (D.C. Cir. 2002).

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DAVIS, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 88-0130

ORDER

It appearing to the Court that the FBI's efforts to contact the putative beneficiaries of FOLIA Exemption 7(C) in this case must be deemed reasonable under *Schrecker v. United States Department of Justice*, 349 F.3d 657 (D.C. Cir. 2003), it is, this 31st day of August, 2004,

ORDERED, that the government's Motion for Reconsideration of the Court's Order of is granted; and it is

FURTHER ORDERED, that the Court amends its Order of July 23, 2002, and relieves the government from undertaking the additional tasks mandated therein; and it is

FURTHER ORDERED, that the government's Motion for Summary Judgment filed on March 11, 2002 is granted; and it is

FURTHER ORDERED, that this case is dismissed with prejudice.

/s/
Thomas Penfield Jackson
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5406 **September Term, 2006**

88cv00130

Filed On: Nov. 13, 2006

John Davis,
Appellant

v.

Department of Justice,
Appellee

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk